No. 14-915

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In The

Supreme Court of the United States

REBECCA FRIEDRICHS, ET AL.,

Petitioners,

v.

CALIFORNIA TEACHERS ASSOCIATION, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS BRIEF IN SUPPORT OF PETITIONERS FOR PUBLIC SCHOOL TEACHERS WHO FAVOR SCHOOL CHOICE

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are current and former public school teachers. They teach because they hope to make a difference in the lives of children. To that end, *amici* believe that families should be free to choose a school that they think will best suit their needs. *Amici* support reforms such as charter schools, education vouchers, and tax credits for education expenditures – a policy package often referred to as "school choice."

Teachers' unions are among the most trenchant opponents of school choice. For instance, the California Teachers Association, a defendant in this case, successfully opposed a ballot initiative that would have expanded school choice; at the time, the union president tarred school choice as "so evil that [it] should never go before the voters."[2]

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[1] Pursuant to Rule 37.6, *amici curiae* affirm that no counsel for a party authored this brief in whole or in part, no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

The parties' letters consenting to the filing of *amicus* briefs are on file with the Court.

[2] Troy Senik, Editorial, *The Teachers Union That's Failing California*, L.A. Times, May 18, 2012, at A21, *available at* http://articles.latimes.com/2012/may/18/opinion/la-oe-senik-california-teachers-association-20120518. After the union failed to keep the measure off the ballot, the union spent over $6 million to oppose the measure with the voters. *Id.*

Amici submit this brief to underscore the harm caused by *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). Quite simply, *amici* want nothing to do with unions that believe school choice is a radical "evil." *Amici* object to compelled association with their ideological opponents *regardless* of how their funds are earmarked to be spent. Nonetheless, under *Abood*, *amici* have been compelled to pay union dues.

Amici are:

Carolyn Lisi, a current public school teacher in Ohio. After Ms. Lisi opted out of union membership, she had to take her union to court to ensure that it was properly calculating her agency fees. Ms. Lisi was compelled to pay approximately $700 in agency fees to her union in 2014.

Karen Ellis May, a current public school teacher in Washington. Because Ms. May has opted out of union membership, approximately 20% of her dues go to a charity of her choice. This charity must be approved by the union.

Clark M. Neily, Jr., a former public school teacher in Massachusetts. Clark bucked his union by publicly advocating for charter school reforms. After Mr. Neily opted out of membership, he was forced to take the union to court to ensure the proper calculation of his agency fees.

Timothy Ramsey, a Family Services Provider with the Head Start program in Washington. Mr.

Ramsey is in the process of opting out of union membership, but he has thus far found the process too time-consuming and cumbersome to complete. When Mr. Ramsey ran for a position on the school board, his candidacy was opposed by his own union.

Steven Schaefer, a current public school teacher in Michigan. Mr. Schaefer opted out of union membership because of political disagreement with his union, but he was nonetheless compelled to pay approximately $820 in agency fees in 2014.

James Williams, a current public school teacher in Pennsylvania. When Mr. Williams asked his union treasurer about opting out of union membership, he was told that it would save him only "about 50 bucks" out of approximately $750 in annual dues. Mr. Williams nevertheless recently opted out of membership because of political disagreement with his union and is waiting to see how much he will be charged.

SUMMARY OF ARGUMENT

Teachers' unions are steadfast opponents of school choice. They have litigated against school choice at this Court for more than forty years.[3] They

[3] *See* Brief of *Amici Curiae* Nat'l Sch. Bds. Ass'n, Ariz. Sch. Bds. Ass'n, Am. Ass'n of Sch. Adm'rs, Nat'l Educ. Ass'n, & Ariz. Educ. Ass'n in Support of Respondents, *Ariz. Christian Sch. Tuition Org. v. Winn*, Nos. 09-987, 09-991, 2010 WL 3806527 (U.S. Sept. 22, 2010); Brief *Amicus Curiae* of the Nat'l Comm. for Pub.

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have also been major opponents of school choice in the States.[4]

Teachers' unions also oppose school choice in the court of public opinion, often employing heated rhetoric in the service of their cause. Union representatives characterize school choice reforms as "tax giveaways to the wealthy who prefer private education,"[5] supported only by "corporate privatizers and

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Educ. & Religious Liberty in Support of Respondents at 1 n.2, *Zelman v. Simmons-Harris*, Nos. 00-1751, 00-1777, & 00-1779, 2001 WL 1638649 (U.S. Dec. 13, 2001) (brief for umbrella organization whose members included, among others, the National Education Association ("NEA"), New York State United Teachers, and United Federation of Teachers); Motion for Leave to File Brief and Brief *Amicus Curiae* on Behalf of the Nat'l Educ. Ass'n & the Horace Mann League, *Sloan v. Lemon*, Nos. 72-459, 72-620, 1973 WL 172015 (U.S. Apr. 6, 1973).

[4] The Florida Education Association, for instance, recently challenged that State's education tax-credit program – a program that funds the education of almost seventy thousand students. Complaint, *McCall v. Scott*, No. 2014-CA-002282 (Fla. Cir. Ct. Aug. 28, 2014), *available at* https://www.au.org/files/legal_docs/2014-08-28%20Complaint.pdf; *see also* John McKay, Editorial, *Tax Credit Scholarships Give Options to Low-Income Students*, Sarasota Herald-Tribune, Mar. 9, 2015, *available at* http://www.heraldtribune.com/article/20150309/columnist/303099996. Previously, three teachers' unions were leading plaintiffs in the suit that led to the Louisiana Supreme Court's invalidation of a publicly funded scholarship program for elementary and secondary school students. *La. Fed'n of Teachers v. State*, 118 So.3d 1033 (La. 2013).

[5] Robert Brodsky, *Cuomo, in Westbury, Presses to Revive Tuition Tax Credit*, Newsday, May 12, 2015, at A15 (statement of Andrew Pallotta, Executive Vice President of New York State United Teachers), *available at* http://www.newsday.com/long-island/

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right-wing politicians."[6] Union representatives are "terrified" of the "very dangerous idea that school is a commodity."[7] They believe that school choice rightly belongs at the "top of [a] junk pile list of so-called education reforms."[8]

Amici do not want to be associated with these views, or with the unions that espouse them. Yet they have been compelled to contribute dues to the teachers' unions under *Abood*.

Abood's supposed cure for this manifest violation of the First Amendment – the segregation of "chargeable" from "non-chargeable" expenses – is ineffectual. Regardless of how their money is spent, *amici* are

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andrew-cuomo-in-westbury-presses-to-revive-tuition-tax-credit-1.10427753.

[6] AFTUnion, *8 Reasons Why School Vouchers Are a Very Bad Idea*, Buzzfeed (Jan. 31, 2014, 3:39 PM), http://www.buzzfeed.com/aftunion/8-reasons-why-school-vouchers-are-a-very-bad-idea-bwcv.

[7] Lyndsey Layton & Emma Brown, *The Ultimate in School Choice or School as a Commodity?*, Washington Post, June 3, 2015 (statement of Lily Eskelsen García, President of NEA), *available at* http://www.washingtonpost.com/local/education/in-nevada-school-choice-on-steroids-and-a-breakthrough-for-conservatives/2015/06/03/3cdd2300-09ff-11e5-95fd-d580f1c5d44e_story.html.

[8] Lily Eskelsen García and Betsy Kippers, Editorial, *Students Lose at Expense of Taxpayer-Funded Vouchers*, Milwaukee Journal Sentinel, Sept. 21, 2014 (editorial by the President of NEA and President of Wisconsin Education Association Council), *available at* http://www.jsonline.com/news/opinion/students-lose-at-expense-of-taxpayer-funded-vouchers-b99354325z1-275803831.html.

forced into association with the unions. The harm of compelled association cannot be cured by an accounting fiction; *amici* should not be forced to contribute money to their ideological opponents for *any* purpose.

Moreover, *Abood* places an unconscionable burden on *amici* to affirmatively opt out of union membership and then monitor the unions to ensure that their agency fees are lawfully calculated and spent. Other than through expensive and time-consuming litigation, *amici* have no practical way of determining with any degree of certainty whether the unions use their agency fees to combat school choice.

Abood is contrary to the First Amendment in principle and unadministrable in practice. It should be overruled.

ARGUMENT

I. Regardless Of How Money Is Spent, Compelled Support For Ideological Opponents Offends The First Amendment.

Compelled association violates the First Amendment. "Making a contribution, like joining a political party, serves to affiliate a person with a [cause]." *Buckley v. Valeo*, 424 U.S. 1, 22 (1976). This is why "[t]he general rule" is that "individuals should not be compelled to subsidize private groups or private speech." *Knox v. SEIU*, 132 S. Ct. 2277, 2295 (2012). In *Abood*, this Court recognized the problem: Because "[a]n employee may very well have ideological

objections to a wide variety of activities undertaken by the union," compelled financial support for the unions "has an impact upon [teachers'] First Amendment interests." 431 U.S. at 222.[9] Yet *Abood* held that this First Amendment injury could be cured by segregation of "ideological" and "non-ideological" expenses. *Id.* at 236. This was error.

Even putting aside the question of whether *any* union expenses are truly "non-ideological" – a question addressed by Petitioners in their brief – *Abood*'s rule does not suffice to protect the First Amendment interests of public school teachers. Compelled monetary contributions remain harmful regardless of how money is spent. Consider an analogy: Planned Parenthood, in addition to being the most prominent abortion provider in the country, offers mammograms.[10] Can pro-life Americans be forced to send in a donation as long as its use is limited to cancer screening? Similarly, the National Rifle Association ("NRA") sponsors gun safety programming in addition to

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[9] *See also* 431 U.S. at 231 ("There can be no quarrel with the truism that because public employee unions attempt to influence governmental policymaking, their activities and the views of members who disagree with them may be properly termed political."); *id.* at 243 (Rehnquist, J., concurring) ("[T]he positions taken by public employees' unions in connection with their collective-bargaining activities inevitably touch upon political concern if the word 'political' be taken in its normal meaning.").

[10] Planned Parenthood, *2013-2014 Annual Report* at 12, *available at* http://issuu.com/actionfund/docs/annual_report_final_proof_12.16.14_/0.

opposing gun control legislation.[11] Can proponents of gun control be forced to contribute to the NRA for the limited purpose of funding gun safety education? The answer should be obvious.[12]

Put simply, *amici* want nothing at all to do with teachers' unions; and that remains true however their money is spent. *Amici* believe that school choice has the potential to better the lives of children and their families. School choice provides increased options for students and their parents, while also creating incentives for traditional public schools to improve their performance and save taxpayer dollars.[13] *Amici* do not want to contribute money to organizations that instead contend that "[b]uzzwords such as 'choice' and 'freedom' are only used to mask what vouchers actually are," which is "a shameful, unacceptable waste of taxpayer dollars."[14]

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[11] Nat'l Rifle Ass'n, *Eddie Eagle Gunsafe Program*, https://eddieeagle.nra.org/ (last visited Sept. 8, 2015).

[12] Indeed, if *Abood* were taken to its logical terminus, it would suggest that Americans could be forced to pay money to the Republican Party, so long as the Party promised that the money would not be spent on "ideological" activities. *Cf. Abood*, 431 U.S. at 257 (Powell, J., concurring in the judgment) (observing that "the public-sector union is indistinguishable from the traditional political party").

[13] *See, e.g.*, Greg Forster, The Friedman Foundation for Educational Choice, *A Win-Win Solution: The Empirical Evidence on School Choice* (Apr. 2013), *available at* http://www.edchoice.org/wp-content/uploads/2015/07/2013-4-A-Win-Win-Solution-WEB.pdf.

[14] Kinjo Kiema, "*Where's the Accountability?*," NEA Today, Apr. 14, 2015 (statement of NEA President), *available at*

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Amici also want nothing at all to do with the anti-religious animus that tinges unions' opposition to school choice. Union representatives dismiss school choice as "a means of circumventing the Constitutional prohibitions against subsidizing religious practice and instruction," which will lead to "religious stratification in our society."[15] And, in litigation challenging school choice programs, unions regularly rely on state constitutional provisions (so-called "Blaine Amendments") that prohibit aid to "sectarian" institutions. These provisions have ugly historical origins in Nineteenth Century anti-Catholic animus.[16] *Amici*, some of whom are themselves deeply religious, do not wish to be associated with these anti-religious views.

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http://neatoday.org/2015/04/14/wheres-the-accountability-ignoring-poor-track-record-lawmakers-push-voucher-expansion/.

[15] *The Case Against Vouchers*, NEA.org, http://www.nea.org/home/19133.htm (last visited Sept. 8, 2015); *see also* AFTUnion, *supra* n.6 ("By 'choice,' [proponents] usually mean taking money out of public schools to fund and send students to schools that are privately run, often by religious groups.").

[16] *See* Robert William Gall, *The Past Should Not Shackle The Present*, 59 N.Y.U. Ann. Surv. Am. L. 413, 414 (2003) (describing Blaine Amendments as "weapons of bigotry forged in the fires of nineteenth century anti-Catholicism"); *see also* Thomas Nast, *The American River Ganges*, Harper's Weekly, May 8, 1875 (illustrating article on supposed threat posed by Catholics to Protestant-influenced public schooling with a picture depicting Catholic bishops as crocodiles set on devouring American schoolchildren).

Amici likewise object to compelled association with rhetoric implying that support for school choice is motivated by racial animus. Union representatives have suggested that "we are allowing our schools to be re-segregated" through school choice,[17] that "[v]ouchers threaten civil rights protections,"[18] and that vouchers "promot[e] segregated education."[19] *Amici*, who support school choice for reasons that have nothing to do with racial animus – and who firmly believe that school choice promotes the interests of people of *all* races, creeds, and origins – recoil at compelled association with this accusation.

Overheated rhetoric is a perfectly normal aspect of life in a free society. What is not perfectly normal is *Abood*'s holding that, as a condition of public employment, *amici* can be compelled to give money to teachers' unions that paint people who support school choice as corporate shills, supporters of racial segregation, and advocates of theocracy.

In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 578-81

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[17] Kristin Rawls, *The Ugly Truth About "School Choice,"* Salon (Jan. 24, 2012, 4:00 PM), http://www.salon.com/2012/01/24/the_ugly_truth_about_school_choice/ (statement of John Wilson, former President of NEA).

[18] *NEA on Vouchers: Opposed*, NEA.org, http://www.nea.org/home/19267.htm (last visited Sept. 8, 2015).

[19] *AFT Resolution: Opposition to Voucher System*, AFT.org (1971), http://www.aft.org/resolution/opposition-voucher-system (last visited Sept. 8, 2015).

(1995), this Court held that the Constitution prohibits government from ordering a group to include certain points of view in its parade. *Abood*, by contrast, forces *amici* to fund organizations that condemn their views in the harshest terms. That compelled association cannot be squared with the First Amendment. *Abood* should be overruled.

II. *Abood*'s Supposed Cure For This First Amendment Injury Places An Unconscionable Burden On Teachers Who Oppose Their Union.

Even if earmarking fees for "non-ideological" purposes could theoretically address this First Amendment harm, it would *still* fall short in practice. In the real world, *amici* have little ability to police the calculation and spending of their agency fees.

Amici should not be forced to litigate against their unions – at considerable time and expense – simply to ensure that their money is not used for prohibited purposes. Yet *Abood* places exactly that burden on teachers who object to union membership: Even after teachers navigate the procedures necessary to opt out of union membership – a process that has thus far proven a barrier to Mr. Ramsey – teachers *still* bear the burden of enforcing compliance with *Abood*. So, both Mr. Neily and Ms. Lisi were forced to engage in time-consuming litigation against their unions to recover funds spent in violation of *Abood*. Meanwhile, Ms. May, Mr. Schaefer, and Mr. Williams,

who have not engaged in such litigation, have no way to know if their compelled contributions are properly accounted for and spent and must take the union at its word that it is following the rule established by *Abood*.[20]

Courts should not assume that unions will scrupulously honor the line drawn by *Abood*. To the contrary, in *Knox*, a union argued that it could charge dissenters for "all funds spent on 'lobbying . . . the electorate,'" which this Court noted is "nothing but another term for supporting political causes and candidates." 132 S. Ct. at 2294. And, in fact, the union had used non-member funds to campaign against a ballot initiative. *Id.* at 2294-95.

Meanwhile, the volume of litigation generated by *Abood* – a rough proxy for the extent of the burden on teachers' First Amendment rights – is considerable. Since *Abood*, this Court alone has decided at least seven cases concerning how best to draw and police the line between chargeable and non-chargeable expenses.[21] The Courts of Appeals have likewise

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[20] *See Harris v. Quinn*, 134 S. Ct. 2618, 2633 (2014) ("Employees who suspect that a union has improperly put certain expenses in the 'germane' category must bear a heavy burden if they wish to challenge the union's actions."). Notably, while this Court's precedents require that a union's books be audited, the auditors "do not themselves review the correctness of a union's categorization" of expenses. *Id.*

[21] *Knox*, 132 S. Ct. 2277; *Locke v. Karass*, 555 U.S. 207 (2009); *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177 (2007); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991); *Keller v.*

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struggled to apply *Abood*, as demonstrated by the cases collected in the appendix to this brief.

Such litigation is expensive. When Mr. Neily and other teachers in Massachusetts sued to challenge the calculation of their compulsory contributions to their union, for instance, the litigation ultimately consumed over 8,000 attorney hours, over 7,000 support staff hours, over 5,000 hours of Westlaw research, and over $160,000 in court costs, expert fees, and travel expenses.[22] Teachers should not be forced to shoulder these kinds of burdens, simply to police the boundaries of their compelled association with the unions.

In this critical respect, moreover, *Abood* is at war with itself. The *Abood* Court reversed the portion of the lower court's opinion requiring dissenters to specifically enumerate the union expenditures to which they object, explaining that this would impermissibly "place on each employee the considerable burden of monitoring all of the numerous and shifting expenditures made by the Union." 431 U.S. at 241. Yet *Abood* places precisely that burden on teachers, including *amici*.

State Bar, 496 U.S. 1 (1990); *Chi. Teachers Union v. Hudson*, 475 U.S. 292 (1986); *Ellis v. Railway Clerks*, 466 U.S. 435 (1984).

[22] *See* Declaration of Emily Pitts Dixon ¶ 10, *Serna v. Transp. Workers Union*, No. 3:13-CV-2469-N (N.D. Tex. Sept. 19, 2014).

Abood's command that unions segregate funds is a paper tiger, incapable of securing even the incomplete protection that it promises against compelled support for union political activities. *Abood*'s supposed cure for the First Amendment injury suffered by *amici* and other teachers is thus not only insufficient in theory, but also totally unworkable in practice.

CONCLUSION

This Court should overrule *Abood*, uphold the right of individuals to be free from compelled association with their ideological opponents, and reverse the decision below.

Respectfully submitted,

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APPENDIX

Cases From The Federal Courts Of Appeals Struggling To Apply *Abood*

1. *Knox v. Cal. State Emps. Ass'n*, 628 F.3d 1115 (9th Cir. 2010), *rev'd and rem'd sub nom. Knox v. SEIU*, 132 S. Ct. 2277 (2012)
2. *Scheffer v. Civ. Serv. Emps. Ass'n*, 610 F.3d 782 (2d Cir. 2010), *cert. den'd* 562 U.S. 1249 (2011)
3. *Seidemann v. Bowen*, 584 F.3d 104 (2d Cir. 2009)
4. *Locke v. Karass*, 498 F.3d 49 (1st Cir. 2007), *aff'd* 555 U.S. 207 (2009)
5. *Wagner v. Prof'l Eng'rs in Cal. Gov.*, 354 F.3d 1036 (9th Cir. 2004)
6. *Otto v. Pa. State Educ. Ass'n-NEA*, 330 F.3d 125 (3d Cir. 2003), *cert. den'd* 540 U.S. 982 (2003)
7. *Cummings v. Connell*, 316 F.3d 886 (9th Cir. 2003)
8. *Wessel v. City of Albuquerque*, 299 F.3d 1186 (10th Cir. 2002)
9. *Sorrell v. Am. Fed. of State, Cnty., & Mun. Emps.*, 52 Fed.Appx. 285 (7th Cir. 2002)
10. *Foster v. Mahdesian*, 268 F.3d 689 (9th Cir. 2001), *cert. den'd sub nom. Foster v. Garcy*, 535 U.S. 1112 (2002)
11. *Tavernor v. Ill. Fed. of Teachers*, 226 F.3d 842 (7th Cir. 2000)

12. *Prescott v. Cnty. of El Dorado*, 177 F.3d 1102 (9th Cir. 1999), *vac'd by* 528 U.S. 1111 (2000), *reinstated in part by* 204 F.3d 984 (2000); *see also* 298 F.3d 844 (9th Cir. 2002), *cert. den'd* 537 U.S. 1188 (2003)

13. *Knight v. Kenai Peninsula Borough Sch. Dist.*, 131 F.3d 807 (9th Cir. 1997), *cert. den'd* 524 U.S. 904 (1998)

14. *Bromley v. Mich. Educ. Ass'n-NEA*, 82 F.3d 686 (6th Cir. 1996), *reh'g en banc den'd* June 17, 1996, *cert. den'd* 519 U.S. 1055 (1997)

15. *Jibson v. Mich. Educ. Ass'n*, 30 F.3d 723 (6th Cir. 1994)

16. *Grunwald v. San Bernardino City Unified Sch. Dist.*, 994 F.2d 1370 (9th Cir. 1993), *cert. den'd* 510 U.S. 964 (1993)

17. *Weaver v. Univ. of Cincinnati*, 970 F.2d 1523 (6th Cir. 1992), *cert. den'd sub nom. Weaver v. Steger*, 507 U.S. 917 (1993)

18. *Mitchell v. L.A. Unified Sch. Dist.*, 963 F.2d 258 (9th Cir. 1992), *cert. den'd* 506 U.S. 940 (1992)

19. *Hohe v. Casey*, 956 F.2d 399 (3d Cir. 1992)

20. *Dashiell v. Montgomery Cnty.*, 925 F.2d 750 (4th Cir. 1991)

21. *Hudson v. Chi. Teachers Union*, 922 F.2d 1306 (7th Cir. 1991), *cert. den'd* 501 U.S. 1230 (1991)

22. *Tierney v. City of Toledo*, 917 F.2d 927 (6th Cir. 1990)

23. *Lowary v. Lexington Local Bd. of Educ.*, 903 F.2d 422 (6th Cir. 1990), *cert. den'd* 498 U.S. 958 (1990)

24. *Gwirtz v. Ohio Educ. Ass'n*, 887 F.2d 678 (6th Cir. 1989), *cert. den'd* 494 U.S. 1080 (1990)

25. *Lehnert v. Ferris Faculty Ass'n*, 881 F.2d 1388 (6th Cir. 1989), *aff'd in part and rev'd in part by* 500 U.S. 507 (1991)

26. *Gilpin v. Am. Fed. of State, Cnty., & Mun. Emps., AFL-CIO*, 875 F.2d 1310 (7th Cir. 1989), *cert. den'd* 493 U.S. 917 (1989)

27. *Ping v. Nat'l Educ. Ass'n*, 870 F.2d 1369 (7th Cir. 1989)

28. *Damiano v. Matish*, 830 F.2d 1363 (6th Cir. 1987)

29. *Andrews v. Educ. Ass'n of Cheshire*, 829 F.2d 335 (2d Cir. 1987)

30. *Robinson v. N.J.*, 806 F.2d 442 (3d Cir. 1986), *cert. den'd* 481 U.S. 1070 (1987)

31. *Champion v. Cal.*, 738 F.2d 1082 (9th Cir. 1984), *cert. den'd sub nom. Champion v. Deukmejian*, 469 U.S. 1229 (1985)

32. *Perry v. Local Lodge 2569 of Int'l Ass'n of Machinists & Aerospace Workers*, 708 F.2d 1258 (7th Cir. 1983)

33. *Ky. Educators Pub. Affairs Counc. v. Ky. Registry of Elec. Fin.*, 677 F.2d 1125 (6th Cir. 1982)